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In The Supreme Court of United States

OCTOBER TERM, 1955

No. 607

RICHLAND IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF RICHLAND IRRIGATION DISTRICT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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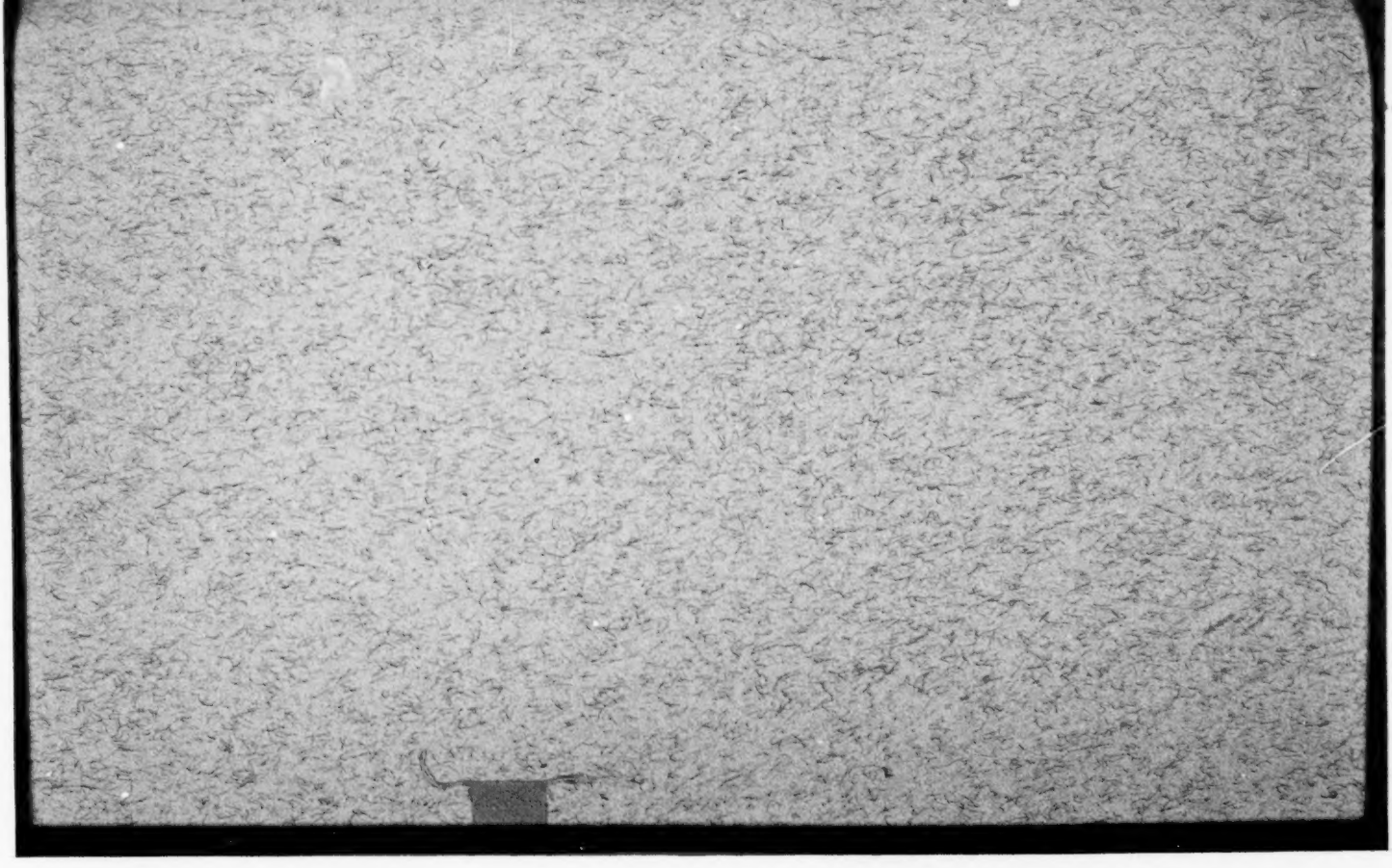

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PETITION FOR WRIT OF CERTIORARI

Opinions in Courts Below

The opinion of the court of appeals below is reported, *Richland Irrigation District vs. United States,* 9 Cir., 222 F.2d 112, and also is printed as Appendix A of this petition. Throughout that opinion (and likewise in this petition) reference to the two appealed cases, consolidated for hearing, is by their trial court numbers, 128-98 and 128-100. The unreported memorandum opinion of the district court below, Judge Schwellenbach, appears in the record (R. 114-120). The unreported oral opinions of the district court below, Judge Driver, appear in the record (R. 189-200; 661-668).

To ascertain the grounds of the judgment, it is necessary to refer to the opinion in a companion case, *United States v. Priest Rapids Irrigation District,* 9 Cir., 175 F.2d 524; and said opinion is printed as Appendix B of this petition.

Grounds on which Jurisdiction Of this Court is Invoked

The judgment of the court of appeals, sought to be reviewed, was dated April 27, 1955 and filed and entered on April 27, 1955 (R. 814).

On August 10, 1955, there was filed the order of the court of appeals, Judge Chambers dissenting, denying the petition for rehearing and rejecting the suggestion of a rehearing en banc (R. 815). On Oc-

tober 21, 1955, Associate Justice Wm. O. Douglas of this court signed an order in this cause providing "that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 7th, 1956."

Section 1254(1) of Title 28 of the United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928, is believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari.

Questions Presented for Review

I

The first question presented for review is: whether in 128-100 the district court's directed verdict (R. 259-260) for the nominal sum of $1.00, denying compensation to the District for its so-called irrigation properties (distribution system), is inconsistent with the Fifth Amendment and inconsistent with the substantive and procedural law of federal condemnation actions.

At the trial in 128-100 on May 28, 1951 (R. 211), the district court refused to admit evidence of, and refused to have the jury determine, the value of the District's irrigation distribution system. There were offers of proof (R. 233-259), by testimony and documentary evidence, of the value (ranging from $455,000 to $546,000) of the District's dams, headgates, canals and distribution system and related lands and facilities. Objections to the offers of proof were made by the Government (R. 229-230); supporting grounds

were stated by the District (R. 230-232); and the offers of proof were rejected by the district court (R. 259).

The above-stated question involves the so-called Schwellenbach formula, which was stated in a memorandum opinion (R. 114-120) by Judge Schwellenbach in June 1945 at a preliminary stage in two similar proceedings, one being 128-100 involving the Richland Irrigation District and the other being 128-99 involving the Priest Rapids Irrigation District. The Schwellenbach formula was adopted and applied in June 1946, at a likewise preliminary stage in the same two proceedings, by Judge Driver in an oral opinion (R. 189-200). Briefly, the Schwellenbach formula denied compensation to each irrigation district for its so-called irrigation properties (distribution system), and allowed compensation to each district for its so-called non-irrigation properties (commercial power properties in the case of the Priest Rapids District, and in the case of the Richland District "foreclosed" lands owned by the District and the undiverted portion of its water rights).

The Richland District's 128-100 case was held in abeyance (R. 205) until decision, including disposition of any appeal, in the Priest Rapids case. In the Priest Rapids case, upon appeal by the Government and cross appeal by the Priest Rapids District, the Schwellenbach formula was affirmed by the court of appeals, Judge Denman dissenting upon the ground,

inter alia, that the decision enabled the Government to deprive the Priest Rapids District of its property without just compensation, in violation of the Fifth Amendment. *United States v. Priest Rapids Irr. Dist.,* 175 F.2d 524. Neither the Government nor the Priest Rapids District sought review of that decision; but the contention of the Government in that case was pressed in other litigation between the Government and the Priest Rapids District.[1]

In the appeals of the Richland Irrigation District (taken in 1952, argued in 1954 and decided in 1955) the Richland District sought to have the court of appeals overrule that part of the Schwellenbach formula which denied compensation to the Richland District for its irrigation properties. This the court of appeals refused to do, but Judge Chambers, in dissenting upon

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[1]The contention of the Government was carried to the Supreme Court of the State of Washington in 1951, in proceedings for dissolution of that district, **In re Priest Rapids Irrigation Dist.,** 37 Wn. 2d 623, 225 P.2d 202. In the matter of payment of attorneys' fee to that district's attorneys, the contention of the Government was again carried to the United States Court of Appeals in **United States v. Moulton & Powell and J. K. Cheadle,** 188 F.2d 865. The Government's interpretation of the irrigation district laws of the State of Washington, which in substantial part was the basis of the Government's contention [in both the Priest Rapids and Richland cases (R. 69)] was rejected **in toto** by Judge MacIver in the state superior court proceedings for dissolution of the Priest Rapids District, in July 1953. The Government did not appeal. Certified copies of Judge MacIver's oral opinion, findings and conclusions were presented, with no objection from the Government, to the Court of Appeals, constituted of Circuit Judges Bone, Orr and Chambers, on August 30, 1954 at the hearing of the Richland District's consolidated appeals, and appear in the record (R. 766-798).

other grounds, described the Schwellenbach formula as "worthy of Merlin, the magician" and stated (222 F.2d 112, 118):

> "I dissent. First, I state that were the Schwellenbach formula described hereinabove and more fully outlined in United States v. Priest Rapids Irrigation District, 175 F.2d 524, before us for the first time, I might concur in Judge Denman's dissent in that case."

After more than twelve years of litigation, there now is presented for review by this court the question whether application of the Schwellenbach formula denied to the Richland District compensation for its irrigation properties, contrary to the Fifth Amendment and contrary to the procedural and substantive law of federal condemnations, as construed by decisions of this court and decisions of other courts of appeals.

II

There is also presented for review this question: was the District entitled to have valued in case 128-100, instead of in case 128-98, the 62,000 acre feet of water rights owned and held by the District for the benefit of 4094.59 acres of "foreclosed" irrigable land owned by the District. The Government's amended petition (R. 61, 63, 65) and declaration of taking (R. 74, 76) in 128-100 described all water rights of the District and purported then and thereby to take fee simple title to all of the District's water rights. (Pur-

suant to the "omnibus" petitions for condemnation filed in February and April 1943 and the contemporaneous orders granting the Government the right of immediate possession under the Second War Powers Act, 1942 (R. 3-31), the Government on October 15, 1943 (R. 347) had taken actual possession of all of the District's properties.) The Government's amended petition (R. 298-335) and declaration of taking (R. 337-339) in 128-98 described the District's "foreclosed" lands but made no mention of any water rights.

In 128-98, the District took the position (R. 434) that the water rights allocable to the District's "foreclosed" lands should not be valued in that proceeding, and instead should be valued in 128-100. The Government took the position (R. 460) that said water rights should be valued in 128-98. The district court, Judge Driver, recognizing the possibility of error (R. 666), in his oral opinion (R. 661-668) in 128-98 decided to value therein said water rights.

It was from affirmance of that decision of the district court that Judge Chambers dissented, 222 F.2d 112, 118.

Comprised within this question II are several subsidiary questions. Among them is this question: was the 62,000 acre feet of water, described in the district court's findings (R. 699) as "the undiverted portion of the water rights of the Richland Irrigation

District", appurtenant to the District's "foreclosed" lands, upon which lands said undiverted water never had been used. An affirmative answer to this subsidiary question of state water law was assumed by the Government in its contention (R. 460) that in 128-98 the Government took the District's "foreclosed" lands "with water rights appurtenant thereto." The district court in its findings of fact and conclusions of law (R. 695-703) and judgment (R. 705-737), and the court of appeals in its affirming decision (222 F.2d 112, 114), inferentially at least gave affirmative answer to this subsidiary question of state law. Such affirmative answer was essential to the conclusion of the courts below, that the undiverted portion of the District's water rights should be valued in 128-98 in which the amended petition and declaration of taking described the "foreclosed" lands of the District but made no mention of water rights.

III

There also is presented for review the question whether the district court's valuation of "the undiverted portion of the water rights of the Richland Irrigation District" was so low as to constitute reversible error.

Constitutional Provisions and Statutes Involved in Cases 128-98 and 128-100

The Fifth Amendment to the Constitution of the United States of America:

"No person shall be held to answer for a capi-

tal, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Declaration of Taking Act, Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C. 258a. The part of said act involved in these cases is the provision which requires that

> "Said declaration of taking shall contain or have annexed thereto—
>
> * * *
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use."

Section 1 of said act is printed in full as Appendix C of this petition.

Laws of Washington 1917, c. 117, sec. 39; 1929 c. 122, sec. 6; R.R.S., sec. 7391 — in part, codified in Revised Code of Washington, 90.28.090, as follows:

> "The right to the use of water which has been applied to a beneficial use shall be appurtenant

to the land or place upon which it is used: *Provided,* that the right may be transferred to another and become appurtenant to any other land or place of use without loss of priority of right if the change can be made without injury to existing rights."

Statement of the Case

On February 23, 1943, for war purposes, the Government commenced condemnation of, and obtained an order granting it the right of immediate possession to, 194,000 acres of land in the State of Washington, for what now is commonly known as the Hanford Atomic Energy Project.

The Government's "omnibus" petition for condemnation (R. 3) invoked the jurisdiction of the District Court for the Eastern District of Washington, Southern Division, under the Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. Sec. 171), and March 27, 1942 (56 Stat. 176, 177; 50 U.S.C., sec. 171(a)). The last cited act, Title II, Section 201 of the Second War Powers Act, 1942, was the authority for the order granting the Government the right of immediate possession (R. 10, 12). The "omnibus" petition was entitled *United States of America vs. Clements P. Alberts, et al.,* No. 128 (R. 3).

On April 22, 1943, by amended "omnibus" petition (R. 16-22) and an order granting the right of imme-

diate possession as to additional property (R. 26-31), the area being taken was enlarged to approximately 204,000 acres.

The entire Richland Irrigation District and all of that District's properties were within the area described by perimeter in the "omnibus" petitions and orders granting to the Government the right of immediate possession. Pursuant to said orders, the Government took actual possession of the properties of the District on October 15, 1943 (R. 347).

Subsequent to the orders granting right of immediate possession (R. 12, 26), the Government from time to time (R. 116) filed amended petitions and accompanying declarations of taking, covering various designated tracts of land within the District. An example of the amended petitions is the one filed on May 19, 1943 and designated No. 128-4 (R. 32-37). Therein the Government added to the recital of jurisdictional authorities:

> "and the Act of Congress approved February 26, 1931 (40 USC 258a) and acts supplementary thereto and amendatory thereof." (R. 33)

The interest taken in the tracts covered by No. 128-4 was described in paragraph IV of the amended petition as follows (R. 33):

> "The fee simple title *subject, however, to existing easements* for public roads and highways, for public utilities, for railroads, for pipe lines and

for existing irrigation ditches, canals and laterals owned by the Richland Irrigation District, in and to the following described lands, to-wit:***" (italics added)

The first trial to determine compensation for individually owned tracts of land within the District was early in October 1943. The tracts involved included the Dietrich tract, No. L-903 (R. 35) covered by the above mentioned amended petition No. 128-4. On behalf of the owners of the Dietrich tract, there was an offer of proof (R. 37) of the value of the properties of the District within which the Dietrich tract was located. That tract was subject to assessment burdens imposed by the District; and the Dietrichs, as owners of the tract, were entitled to such benefits as might accrue to assessment paying owners of a tract within the District. The Government objected to the offer of proof (R. 44-46, 52). Judge Schwellenbach sustained the objection and made an oral statement for the record regarding his ruling (R. 49-50, 52-54).

The Government, at that first trial on October 8, 1943, through counsel stated and greed that the Government would proceed expeditiously with the filing of a declaration of taking covering the Richland Irrigation District's property (R. 47). More than six months passed without such a declaration of taking being filed, and on April 26, 1944, in proceedings had in the court's chambers (R. 55-60), Judge Schwellenbach indicated that unless a declaration of taking cov-

ering the District's property was promptly filed, the court would permit the individual property owners to submit testimony as to the value of their proportionate share of the District's assets.

A few days before the April 26, 1944 proceedings in the court's chambers, the Secretary of War had already written to the Attorney General requesting the filing of declaration of taking 128-98 (R. 298-335, 337-339) covering foreclosed lands owned by the Richland District. As the Secretary of War stated in his April 22, 1944 letter to the Attorney General (R. 335-337):

> "All the tracts contained in this declaration of taking belong to the Richland Irrigation District, a corporation, and constitute the surplus assets of the District. The interests being acquired herein are to be distinguished from the proprietary or operating assets of the District. Consideration is now being given to the advisability of filing a declaration of taking against the proprietary or operating assets of the District, and you will be advised in the near future as to the procedure which will be followed in this matter."

Threatened with having past verdicts in individual land owners' cases set aside by Judge Schwellenbach, the Secretary of War by his letter of May 4, 1944 to the Attorney General recommended that declaration of taking 128-100 covering the District's facilities and properties be filed immediately. In said letter (R. 71, 73) the Secretary of War stated the "Acquisition Policy" established by the War Department and approved by the Department of Justice:

"An appraisal report is not furnished on any of the lands and interest described in the declaration of taking for the reason that under the acquisition policy established by this Department and approved by the Department of Justice, it is the position of the Government that upon acquiring all of the land in the Irrigation District, the Government becomes the owner of all the facilities and properties of any nature of the Irrigation District, and an appraisal is therefore unnecessary."

In accordance with the acquisition policy established by the War Department, the amended petition 128-100 (R. 61-71) contained as paragraph VI (R. 69) the following:

"That the real property and interests therein described in paragraph IV hereof constitute all of the operating properties and facilities owned of record or claimed by the Richland Irrigation District, a municipal corporation of the State of Washington. That petitioner, United States of America, by reason of its ownership of all the real property lying within the boundaries of said Richland Irrigation District is in truth and in fact the equitable owner of the real property and interests therein described in paragraph IV hereof, subject only to the lien of the bonded indebtedness of said Richland Irrigation District, and said Richlan Irrigation District, a municipal corporation of the State of Washington, now holds legal title thereto in trust for the use and benefit of petitioner, United States of America. That the sum of $36,020 deposited in the registry of this court with the filing of declaration of taking, No. 98, covering the foreclosed lands of said Richland Irrigation District, and the sum of $48,300

> deposited in the registry of this court with the filing of declaration of taking, No. 100 herein, together represent a sum which with the bond redemption fund of said Richland Irrigation District is sufficient to pay and discharge all of the bonded indebtedness of said Richland Irrigation District."

The District on May 8, 1945 filed an answer to the amended petition No. 128-100, taking issue with the "acquisition policy" as set forth in paragraph VI of the amended petition, and affirmatively alleging the value of the District's properties (R. 107-113). The Government demurred to said answer (R. 113), and after a hearing on that demurrer [and on a demurrer to the answer of the Priest Rapids Irrigation District in a similar proceeding, No. 128-99], Judge Schwellenbach filed his memorandum opinion on June 21, 1945 (R. 114-120). An order sustaining the Government's demurrer, with leave to amend, was signed on June 25, 1946 (R. 120). Shortly thereafter Judge Schwellenbach left the bench. Early in 1946 he was succeeded by Judge Driver.

The District filed an amended answer (R. 121-129) and the Government again demurred (R. 129). That demurrer was argued on May 31 and June 1, 1946, before Judge Driver. At the conclusion of argument he rendered an oral opinion (R. 189-200), in which he overruled the demurrer but decided that he should adopt and apply the so-called Schwellenbach formula (R. 196).

By stipulations and court orders (R. 470, 471, 204, 205) trials of the Richland proceedings, 128-98 and 128-100, were held in abeyance until decision, including disposition of any appeal, in the similar and companion proceeding 128-99 involving the Priest Rapids Irrigation District.

Adoption and application of the so-called Schwellenbach Formula in the Priest Rapids proceeding 128-99 was affirmed, upon appeal and cross appeal, by the court of appeals in *United States v. Priest Rapids Irr. Dist.*, (1949) 175 F.2d 524, Judge Denman dissenting on the ground, *inter alia*, that the decision enabled the Government to deprive the Priest Rapids Irrigation District of its properties without just compensation, in violation of the Fifth Amendment to the Constitution. Neither the Government nor the Priest Rapids District sought review of that decision.

In the subsequent appeals by the Richland Irrigation District, the District contended that the court of appeals' decision in the Priest Rapids case should be overruled in part, to permit the District to receive just compensation for its irrigation properties. This the court of appeals refused to do (222 F.2d 112, 117).

The question, whether the undiverted portion of the District's water rights allocable to or held for the District's foreclosed lands should be valued in 128-98 or

in 128-100, was raised and the court's ruling reserved, on January 20, 1947 in 128-98, before that case was ordered to be held in abeyance (R. 344, 460-464).

When further proceedings in 128-98 were resumed on May 15, 1951 (R. 473),[2] after discussion as to types of evidence which had been offered on conflicting theories (R. 474-479), the court concluded to allow evidence to come in in support of any theory, of all the theories, and then to make findings upon every theory (R. 479). Additional evidence was received accordingly (R. 479-661); two offers of proof involving the Roza and Tieton Divisions of the Yakima Federal Reclamation Project were rejected (R. 618-623); and after arguments to the court, Judge Driver in an oral opinion announced his decision (R. 661-668). Judge Driver decided that 128-100 involved only the bare legal title to the District's water rights allocable to or appropriated for the District's foreclosed lands, and that said water rights were taken in 128-98 (R. 661).

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[2]When No. 128-98 came on for further trial proceedings, No. 128-91, by stipulation was joined for trial with No. 128-98 (R. 698). No. 128-91 covered two tracts of land N-1069 and 0-1218 (R. 698) of 0.11 acres and 100.8 acres, respectively (R. 707-708). Those tracts were owned by the District, but for some reason were covered by a separate declaration of taking, 128-91. From the time further proceedings were resumed, May 15, 1951 (R. 473), the caption of No. 128-98 carried also No. 128-91. Joinder of No. 128-91 merely brought into the trial two tracts of the District's foreclosed lands which were not covered by No. 128-98.

In the interest of brevity, references in this petition to No. 128-98, re further proceedings commencing May 15, 1951, is intended to include No. 128-91.

Judge Driver valued the District's foreclosed lands together with water rights allocable to said lands (R. 665-666) as follows: 4094.59 acres of irrigable land at $12.50 per acre; 260 acres of non-irrigable land at $1.50 per acre; 85.14 acres of better, sub-irrigated pasture land at $4.00 per acre. Judge Driver further announced (R. 666) that if he were obliged to value the land without the water rights he would place "a value upon it, a straight through value of $1.50 an acre."

Judge Driver, in his oral opinion in 128-98 on May 15, 1951 (R. 661), stated his view that 128-100 involved only bare legal title to the District's water rights held for the District's foreclosed lands, and that the Schwellenbach formula was to be adopted and applied in 128-100, with a consequence of the District not being entitled to any compensation for its irrigation operating properties.

At the May 28, 1951 trial in 128-100 there was colloquy between court and counsel (R. 211-228) regarding the possibility of the Government's seeking a "deficiency" judgment against the District. There followed statement of the Government's position that the District was not entitled to any compensation for the District's properties described in 128-100 (R. 229-230) and statement of the District's position that under the Fifth Amendment to the Federal Constitution the District was entitled to compensation meas-

ured by the value of said properties of the District (R. 230-232). Thereupon in the absence of the jury and on behalf of the District a number of offers of proof, of value of the District's properties described in 128-100, were made and were rejected by the court (R. 233-259). The jury was then called in and directed to return a verdict for the nominal sum of $1.00 (R. 259-260).

In connection with proposed findings of fact, conclusions of law and form of judgment in 128-98 and form of judgment in 128-100, the Government proposed in 128-100 (R. 260-269) a $61,104.78 judgment against the District (R. 268); the District filed formal objection with supporting reasons (R. 273, at 276); and a hearing was held on February 7, 1952. At said hearing, motions for new trial were made in 128-98 and 128-100 (R. 690-691). In ruling on the motions for new trial (R. 691-694), the court proposed to grant a new trial in 128-98, unless the Government disclaimed judgment against the District in No. 128-100. The Government disclaimed such a judgment (R. 694-695); and findings of fact and conclusions of law (R. 695-703) and judgment (R. 705-737) in 128-98 and judgment on verdict (R. 281-289) in 128-100 were signed and filed April 30, 1952.

According to the court's findings of fact (R. 700) in 128-98, the value of the total of 4439.73 acres of the District's foreclosed lands "together with all ap-

purtenant water rights, was, at the date of the taking of said lands by the United States of America, to-wit, the 15th day of October, 1943, the sum of $51,912.94." And the value of the foreclosed lands "without appurtenant water rights was on said date the sum of $6,649.60." Inferentially at least, the district court in 128-98 valued the undiverted portion of the District's water rights, allocable to the District's foreclosed lands, at $45,263.34.

However, it appears that the court's oral decision and findings in No. 128-98 did not "reflect the court's attitude and real judgment about the valuation of these lands***." (R. 692). Considering, in combination, the court's findings in No. 128-98 and the court's ruling and orders on the motions for new trial, it appears that, in effect, the court deemed the District's foreclosed land and related water rights to be worth $51,912.94 as found in No. 128-98, plus the $62,104.78 (R. 283, 292) paid into No. 128-100 by the Government to meet the District's bonded debt — a total of $114,017.72. Assuming that the entire amount of $62,104.78 was deemed water right value — in other words that the court's finding of $6,649.60 for the land without water rights remained unaffected by the rulings on the motions for new trial — then in effect the district court's conclusion was that just compensation for the undiverted portion of the District's water rights, allocable to the foreclosed lands, was $45,263.34 plus $62,104.78, a total of $107,368.12.

Argument

I

By decisions of this court it is established that the just compensation required by the Fifth Amendment is the full and perfect equivalent in money of property taken by the Government. *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463; *Olson v. United States,* 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236; *United States v. Miller,* 317 U.S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336.

By decisions of this court it is established that federal condemnation proceedings are in rem. *United States v. Petty Motor Co.,* 327 U.S. 372, 376, 66 S. Ct. 596, 90 L. Ed. 729; *Duckett & Co. v. United States,* 266 U.S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216. As the court of appeals for the third circuit, relying upon a decision of this court, stated in *United States v. 25.936 Acres of Land, Etc.,* 3 Cir., 153 F.2d 277, 279:

> "A condemnation proceeding is a proceeding in rem. It is not a taking of rights of persons in the ordinary sense but an appropriation of the land or property itself. As indicated by the Supreme Court in Duckett & Co. v. United States, 266 U.S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216, all previous existing estates or interests in the land are obliterated. An unqualified appropriation in fee simple by the United States under the Act, cited supra, creates a new title."

In conflict with the above decisions, in 128-100 there was no determination of the full and perfect equiva-

lent in money of the operating properties of the District taken by the Government. The District's properties were within the areas described by perimeter in the "omnibus" petitions of February and April 1943, in which petitions it was shown that fee simple title to the areas was being taken, subject only to easements other than those of the District (R. 4, 17). In the ancillary proceedings, in which compensation was paid for the various farm tracts within the District, the amended petitions, accompanied by declarations of taking, did not describe any properties of the District and expressly excluded from those proceedings any easements of the Richland Irrigation District for its irrigation distribution system located on said tracts (R. 33). Moreover, in those ancillary proceedings the landowners were denied permission to have the value of the District's properties considered in determination of compensation for their farm tracts (R. 37-54). Although noting said denial (R. 117), Judge Schwellenbach in his memorandum opinion stated that compensation for the District's irrigation properties, if made in 128-100 (the only ancillary proceeding in which those properties were described), "would amount to double compensation." (R. 118). But the record shows that, except for the directed verdict of one dolar in 128-100 (R. 260), there has not been any compensation determined or paid for the District's irrigation properties. The $62,104.78 paid into 128-100 by the Government to meet the District's bonded debt was deemed and treated by Judge Driver as part of

the compensation for the undiverted portion of the District's water rights which he valued in 128-98 (R. 691-694).

The decisions in 128-100 by the district court and the court of appeals involve disregard of the in rem character of condemnation proceedings and disregard of the Fifth Amendment's requirements, in conflict with decisions of this court and of other courts of appeals.

Unless extensive research by counsel for the District has inadvertently missed another similar case, there appears to be only one reported case in which the Government has made a contention similar to the "double compensation" contention made against the Priest Rapids and the Richland Irrigation Districts, and adopted by the courts below in 128-100. That one case is *United States v. 25.4 Acres of Land,* 71 F. Supp. 248, 251 (D. C., E. D. N. Y. 1947). There the district court flatly rejected the Government's contention and the Government did not appeal.

II

The court of appeals' decision affirming valuation in 128-98, instead of in 128-100, of the undiverted portion of the District's water rights (222 F.2d 112, 114):

> "The trial court held that the declaration in 128-98 took the land and appurtenant water rights; that the declaration in 128-100 took the bare legal title to the water separated from any beneficial interest. In this interpretation we concur."

is in conflict with the decision of the fifth circuit in *Anderson v. United States,* 5 Cir., 179 F.2d 281, 283, cert. den. 339 U.S. 965. The fifth circuit decided in favor of the Government's contention in that case, that the taking was in January 1946 when the Government commenced condemnation and took actual possession, rather than ten months later, November 1946, when the Government filed a declaration of taking. As that court of appeals stated (179 F.2d 281, 283):

> "Had there been no declaration of taking filed in this case the title would, nevertheless, have been obtained at the end of a suit, and it would have related back to, and been based upon, the value at the time the United States took possession in the condemnation suit. The declaration of taking and the deposit of compensation were not the beginning of a new suit and were not in abrogation of the original suit, but constituted a further step in a suit already begun. See Catlin v. United States, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911; Dade County v. United States, 5 Cir., 142 F.2d 230. If there was a taking in January, there was not a second taking in November."

Paraphrasing and applying the language of that court to the situation in the instant cases: if there was a taking in October 1943, there was not a second taking in May 1944 when the Government filed declarations of taking 128-98 and 128-100. The declarations of taking and deposits in court were not the beginning of new suits and were not in abrogation of the original suit, but constituted further steps in a

suit already begun in which the taking of the properties already had occurred in October 1943 under the Second War Powers Act, 1942.

The court of appeals' decision, affirming valuation in 128-98, instead of in 128-100, of the undiverted portion (62,000 acre feet) of the District's water rights, is in conflict with the clear requirement of the Declaration of Taking Act (40 U.S.C. 258a) that the declaration of taking contain or have annexed: "(2) A description of the lands taken sufficient for the identification thereof."

The amended petition and declaration of taking in 128-98 (R. 298-338) described the District's foreclosed lands; did not describe any other District property; and expressly excluded such easements for the District's irrigation distribution system as were located on the foreclosed lands. The amended petition and declaration of taking in 128-100 (R. 61-82, at 79) described and (although taking had occurred in October 1943) purported to take free simple title to all of the District's water rights.

Moreover, the court of appeals' implicit decision (222 F.2d 112, 113, 114, 115) that the undiverted portion of the District's water rights was appurtenant to the District's foreclosed lands, on which the undiverted portion never had been used, is in conflict with the law of the State of Washington (R.C.W. 90.28.090):

> "The right to the use of water which has been applied to a beneficial use shall be appurtenant to the land or place upon which it is used: *Provided,* That the right may be transferred to another and become appurtenant to any other land or place of use without loss of priority of right if the change can be made without injury to existing rights."

III

In conflict with this court's applicable decision, as stated in *United States v. Miller,* 317 U. S. 369, 374, 63 S. Ct. 276, 87 L. Ed. 336:

> "Where for any reason, property has no market, resort must be had to other data to ascertain its value;***"

the court of appeals' decision affirms the district court's refusal to consider evidence of value of irrigation water sold separate from the land and outside the District "since there was no showing of a prospective purchaser for that purpose." and "since no market could be shown for the sale of the water outside the District,***." (222 F.2d 112, 116, 117).

There was uncontroverted evidence by the former superintendent of the Yakima Federal Reclamation Project that 62,000 acre feet of irrigation water in the Yakima valley in 1943, and for years prior to and subsequent to 1943, had a present worth of $3.25 per acre foot, or a total of about $200,000 (R. 586-638). Disregard of that evidence, and rejection of offers of

proof regarding the price of water rights in the Roza Division of the Yakima project (R. 618-623), were in conflict with the criteria for determining just compensation announced by this court in the *Miller* case, *supra,* and cases therein cited.

Conclusion

For the special and important reasons set forth above, this court by writ of certiorari should review the court of appeals' decisions in 128-98 and 128-100.

Respectfully submitted,

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December 29, 1955

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHLAND IRRIGATION DISTRICT, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,542 Apr. 27, 1955

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Before: BONE, ORR and CHAMBERS, Circuit Judges.

ORR, Circuit Judge:

We have for consideration two appeals consolidated for hearing. The cases in which the appeals are taken were numbered 128-98 and 128-100 in the trial court.

The United States of America, in order to provide space for the Hanford atomic project situate in the state of Washington, instituted condemnation proceedings involving some 204,000 acres of land. Property in private ownership as well as properties of appellant Richland Irrigation District were taken. District properties are involved in the cases now before us. Two declarations of taking were filed. The declaration in case 128-98 was filed on May 20, 1944, while that in case 128-100 was filed on May 23, 1944. Lands

taken under 128-98 had been acquired by the District through foreclosure actions. Declaration of taking in 128-100 was intended to take all the outstanding titles and interests of the District not taken and compensated for in suits against private landowners or in 128-98. In suit 128-98 a trial was had before the court sitting without a jury, a jury having been expressly waived.

In the 128-98 suit the Court valued the foreclosed lands together with appurtenant water rights in the sum of $114,017.72. Subsequently, case 128-100 was tried before a jury. In that suit the Court rejected offers of proof of the value of the water rights allocable to the foreclosed lands and the irrigation properties of the District, consisting of canals, ditches, laterals, and diversion works. Proof of the value of the water rights appurtenant to the foreclosed lands was rejected for the reason that the rights had been properly compensated for in 128-98; proof of the value of the irrigation properties was rejected on the ground that the properties had been compensated for in the actions against private landowners. The trial court instructed the jury to return a verdict in a nominal sum on the theory that compensation had been given in suits against private owers and in case 128-98 for all property of value within the District, and that no more than bare legal interests remained to be taken in 128-100.

The District argues that the Court erred in valuing the foreclosed lands together with appurtenant water rights in 128-98. It insists that the declaration of taking in 128-98 took the land only, while the declaration in 128-100 condemned appurtenant water; hence, water rights should have been valued in 128-100 separately from the land. It is further contended by the District that in the event it be held that the valuation of the appurtenant water rights in 128-98 was proper, then the valuation placed thereon by the trial court

was grossly inadequate and is without support in the evidence. In addition, it is argued that the awarding of no more than nominal damages in case 128-100 for the irrigation properties of the District was erroneous and constituted a violation of the requirement of just compensation contained in the Fifth Amendment.

The filing of a declaration of taking which by apt words condemns a property interest immediately vests in the Government title to the interest described; and the Government thereby becomes obligated to pay for the condemned interest in the proceeding in which it is described. United States v. Sunset Cemetery Co., 7 Cir., 1942, 132 F.2d 163. The District relies on the wording of the declarations of taking in cases 128-98 and 128-100 to support its contention that the foreclosed lands should have been valued separately from appurtenant water rights.

The declaration of taking in 128-98, which describes the various tracts of foreclosed land held by the District, declares that the estate taken is "the full fee simple title thereto subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, and for existing irrigation ditches, canals, and laterals owned by the Richland Irrigation District." This declaration makes no specific mention of appurtenant water rights.

The declaration of taking in 128-100 declares that part of the estate there taken is "the fee simple absolute title to the property described as Parcel RD-3." A part of the property described as Parcel RD-3 is: "All water rights and appropriations of water from the Yakima River made or owned by the Richland Irrigation District, a corporation."

It is the position of the District that the Government, by phrasing the declarations of taking so as to specifically mention water rights in 128-100 but

not in 128-98, bound itself to compensate separately for the land in 128-98 and for the water rights in 128-100. The trial court held that the declaration in 128-98 took the land and appurtenant water rights; that the declaration in 128-100 took the bare legal title to the water separated from any beneficial interest. In this interpretation we concur.

Under the law of the state of Washington the grant or acquisition of a full fee interest carries with it appurtenances to the land. The express mention of either the particular appurtenances involved or appurtenances generally is unnecessary. They pass by implication with a full fee interest. See Zainey v. Lunde, (1925), 121 Wash. 572, 209 P. 1085. Hence, the taking in 128-98 of the "full fee simple title" took also any appurtenant water rights. No express reservation of such rights appears. The reservation contained in the declaration of ". . . easements . . . for existing irrigation ditches, canals, and laterals owned by the Richland Irrigation District" refers to easements for the purpose of carrying water to other lands within the District.

The language in 128-100 taking "all water rights" was not intended to take and could not have taken the beneficial interest in the water. The water rights were a proper part of the fee interest taken in 128-98. The declaration in that case was filed before the declaration in 128-100, which stripped 128-100 of any power to take other than a bare legal interest. That the declaration of taking in 128-100 took no more than a bare legal title is made explicit by the following statement contained in the amended petition for condemnation in 128-100:

"VI. That the real property and interests therein described in paragraph IV hereof constitute all of the operating properties and facilities owned of record or claimed by the Richland Irrigation District,

a municipal corporation of the State of Washington. That petitioner, United States of America, by reason of its ownership of all the real property lying within the boundaries of said Richland Irrigation District is in truth and in fact the equitable owner of the real property and interests therein described in Paragraph IV hereof, subject only to the lien of the bonded indebtedness of said Richland Irrigation District, and said Richland Irrigation District, a municipal corporation of the State of Washington, now holds legal title thereto in trust for the use and benefit of petitioner, United States of America. That the sum of $36,020 deposited in the registry of this court with the filing of declaration of taking No. 98, covering the foreclosed lands of said Richland Irrigation District, and the sum of $48,300 deposited in the registry of this court with the filing of declaration of taking No. 100 therein, together represent a sum which with the bond redemption fund of said Richland Irrigation District is sufficient to pay and discharge all of the bonded indebtedness of said Richland Irrigation District."

The amended petition for condemnation in 128-100 explicitly states that the United States is already the equitable owner of the interests therein described and that the deposit in 128-100 is being made for the purpose of paying and discharging the bonded indebtedness of the District. This seems sufficiently plain to have advised the District that the Government was not taking separately the equitable interests in the foreclosed lands and in the appurtenant water rights.

The District is inconsistent in arguing that the water appurtenant to the foreclosed lands but not that appurtenant to the private lands should be valued in 128-100. A petition for condemnation in an action against one of the private landowners appears in the record. It seeks to condemn, in language almost identical to that of the declaration of taking in 128-98:

"The fee simple title subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines, and for existing irigation ditches, canals, and laterals owned by the Richland Irrigation District." The declarations against the private lands as well as that against the foreclosed lands omitted any specific mention of water rights. Yet the District does not contend that it was improper to value the private lands as irrigated lands with an assured and adequate water supply, that is, with water rights. No reason appears why the foreclosed lands should be treated differently from the private lands.

We now consider the alternative contention of the District that the trial court's valuation of the foreclosed lands together with the water allocable to them was inadequate and has no proper support in the evidence. In 128-98 the court found the value of the foreclosed lands with appurtenant water to be $51,912.94, and the value of the foreclosed lands without appurtenant water to be $6,649.60. However, the court, in fixing the value of the lands with water available made an allowance for $62,104.78 paid by the Government in 128-100 for the purpose of discharging the District's bonded indebtedness. Thus the court valued the land with water at $114,017.72, and the water was valued at the difference between $114,017.72 and $6,649.66, or $107,368.12.

This implied finding that the water rights were worth not more than $107,368.12 is said to be without substantial support in the record. The District relies upon the testimony of two of its witnesses who testified as to the value of the water rights if sold separate from the land and outside the District. One of these witnesses thus valued the water at $3.25 per acre foot for the 62,000 acre feet allocable to the foreclosed lands, or approximately $200,000; the other valued the water at "between sixty and seventy dol-

lars an acre", or between $243,000 and $284,000. The Government introduced no evidence as to the value of the water separate from the land if sold outside the District. The District's position is that since the witness placing the lowest value on the water if sold apart from the land testified that it was worth around $200,000, there was no basis in the evidence on which the court could value the water, as it impliedly did, at around $107,000.

This argument overlooks a crucial finding of fact made by the trial court, to-wit, "the highest and best use to which the undiverted portion of the water rights of the Richland Irrigation District could have been put, was its application to the lands under District ownership for the irrigation of the same." The meaning and basis of this finding is set forth in an oral opinion of the court which reads, in part, as follows:

> "From the evidence in the case it is my conclusion that the highest and best use for this land at the time the government took it was for agricultural purposes, with the water to be used on this land and not separated from it and sold elsewhere. I have taken into consideration the evidence here that lands might have been irrigated with this water along what has been called The Horn, and adjacent to Kiona in Benton County, but in the first place there isn't any showing that there was any demand for this quantity of water, a block of water, or water, rather, sufficient to irrigate a block of some 4,000 or more acres of land. Necessarily a purchase of that quantity of water could come only from an irrigation district or from a water company or from the Reclamation Bureau, and there isn't any showing that there was any such purchaser ready, able and willing to buy.

"For another thing, it would be necessary in order to apply this water to those lands that it be pumped for a height ranging from 200 to 300 feet, and it just doesn't seem to me that there has been shown here enough difference between the quality of the land along The Horn and Kiona, and this land in the district which the district owned, the 440 acres, that there was enough difference to warrant somebody buying that water and pumping it two or three hundred feet. I don't think there's any evidence in the record to show what it costs to buy pumping machinery, buy power, and pump water at that considerable height. I think Mr. Miller did testify that so far as the district was concerned, he thought about 35 feet was the limit. There has been evidence here of pumping to greater heights, but we all know and I think of course the court may take judicial notice of the fact that it does entail considerable expense to pump water two or three hundred feet and apply it to land, and this land is raw land and not cultivated at the present time, to taking all these elements into consideration, it is my view that the highest and best use for the water and the land taken by the government was irrigation of the land with the water, as it existed in the district rather than diverting the water or separating it from the land and using it outside the district."

The trial court seems to have taken the view that evidence of value of water sold separate from the land and outside the District should not be considered since there was no showing of a prospective purchaser for that purpose. Cf. Olson v. United States, (1934), 292 U.S. 246. The trial court throughout the proceeding took the position that if it could be shown that a greater value could be realized by selling the water separate from the land, he would allow that value as the highest and best use of the assets condemned,—

the land and the water. The trial court concluded, however, that since no market could be shown for the sale of the water outside the District, its highest and best use was on the lands in the district for which it constituted a sufficient but not overadequate supply. The court's determination that the value of the land with the water was $114,017.72 has a proper basis in the evidence.

Error is specified in the rejection of an offer of proof relating to sales of lands in the Roza Division of the Federal Yakima Project. The offer was for the purpose of showing that there existed a substantial market for lands in the Roza Division, the buyer paying for the land itself, and also assuming an obligation to repay in forty years without interest a then estimated construction cost amounting to $240 per acre, which obligation had in 1943 an approximate present value of $120 per acre. In support of this contention the District cites United States v. 5139.5 Acres of Land, 4 Cir., 200 F.2d 659, a case in which the judgment in a condemnation action was reversed partly because of a failure of the trial court to admit testimony as to sales of similar lands. In that case, however, the evidence was excluded not because the trial court in the exercise of its discretion found the sale, as to which the testimony was offered, to be in fact dissimilar, but because the trial court excluded the testimony by erroneously applying the hearsay and best evidence rules. In this case the offer was rejected on the ground that it was an attempt to show a dissimilar situation and not for the purpose of showing comparable sales of land.

The District's remaining argument is that the Court erred in rejecting an offer to prove the value, by way of reproduction cost, of the irrigation properties of the District, consisting of canals, ditches, laterals, and diversion works. The offer was rejected on the ground

that the irrigation assets had already been valued and compensated for in the actions against private landowners. Such a ruling was required by the application of the so-called Schwellenbach formula, the use of which was approved by this court in United States v. Priest Rapids Irrigation District, (1949), 175 F.2d 524. In this branch of its argument the District urges that United States v. Priest Rapids Irrigation District, supra, be overruled. This we decline to do.

The Schwellenbach formula was adopted in order to deal with the unprecedented situation which grew out of the Government's action in condemning entire irrigation districts. The purpose of the formula was to properly allocate for trial, either in the actions against the individual landowners or in a general action against the irrigation district, the various elements of value taken by the Government when it condemned all the land in an irrigation district. In the individual actions the land owners were compensated for the land as land with an adequate water supply available at a certain charge. The private lands were thus valued as irigated lands enhanced in value by the assets of the District directly devoted to supplying the land with water. By thus compensating the landowners the Government paid the value of the irrigation assets as measured by their highest and best use, namely, enhancing the value of the lands. To allow further compensation for these assets as measured by their reproduction cost in 128-100 would be double compensation. Moreover, compensation based on reproduction cost would not measure the real worth of the irrigation facilities, which had value only in that they serviced the land and thereby enhanced its value. The Schwellenbach formula furthered the award of just compensation by affording a rational solution to a difficult valuation problem. It compensated the landowners for the value of the irrigation assets as measured by their highest and best use in enhancing the value of the land, and at the same time prevented a double recovery.

It has been said that the District was placed at a disadvantage by the valuation of the foreclosed lands together with appurtenant water rights in 128-98 in that it was maneuvered out of a jury trial on the value of the water rights. The District, after having stipulated for a non-jury trial in 128-98, made no motion to be relieved of its stipulation either at the time in the trial of 128-98 when the court took evidence of the value of the water rights or at any other time. The District did not complain that it was deprived of a jury trial in its motion for a new trial, or in the specifications of error or briefs before this court.

The judgments entered in cases 128-98 and 128-100 are affirmed.

CHAMBERS, Circuit Judge, dissenting:

I dissent. First, I state that were the Schwellenbach formula described hereinabove and more fully outlined in United States v. Priest Rapids Irrigation District, 175 F.2d 524, before us for the first time, I might concur in Judge Denman's dissent in that case.

The so-called Schwellenbach formula is worthy of Merlin, the magicion. The formula works this way. The cases of the individual farmers who are suffering condemnation are brought on for trial. These owners attempt to show the nature and value of the irrigation system which serves them. This they are refused, and they are permitted only to show the value of the land with "an adequate water supply." They are told the value of the assets of the irrigation district will be determined in a separate suit—Priest Rapids facilities will be valued in 128-99 and Richland in 128-100.[1] Then 128-99 and 128-100 come on for trial. The farmers who owned the districts are told (by the court telling their districts) that these cases against the dis-

[1]At one point in the 128 series of condemnation proceedings, it was necessary for the trial judge to force the United States to file the notices of taking in the 128-98, 128-99 and 128-100 cases on the district interests under threat of granting new trials in all of the individual farmers' cases.

tricts take not valuable rights but only "bare bones"; that all the value in irrigation assets was taken when the farm land was taken from the individual landowners. The effect of this is that everything is taken from the district and the landowners and no witness is permitted to tell and no jury is permitted to hear whether the dams owned by the district are good for one more year or for two hundred years. It remains a shrouded secret whether the districts' ditches are infested with rodents and leak badly or whether they are cement lined. The districts had roadways. Were they paved or were they in horible shape? Possibly a dam, a ditch, a roadway or a pump has no second hand value. But how are we to know without evidence?

Nevertheless, no one sought certiorari in Priest Rapids, supra. So, wondrous as the Schwellenbach formula is to me, I would apply it all of the way through this Hanford condemnation. I cannot see one rule for one fork of the river and another rule for another fork in two cases started at the same time.

But still accepting the Schwellenbach formula for Richland, I have trouble with the trial court's handling of the case. It is I who thinks Richland was maneuvered out of a jury where it was entitled to one. We may grant that Washington water law holds that water is appurtenant to the land. Ordinarily, a taking of land would take with it the land's water. But it is my belief that under the pleadings and declarations of the United States herein the defendants were entitled to think that the government had chosen artificial ground to stand on, that it had chosen to have the water belonging to the "foreclosed lands" described in 128-98 valued in 128-100. (And I believe Richland had a right to accept this artificial division.) I find credence for this in the fact that while the declaration in 128-100 mentions water rights, the declaration in 128-99 filed the same day, to clean up the job of taking all of Priest Rapids' assets not already

taken from the farmers, does not mention water rights. When the 128-98 and 128-100 (Richland) and 128-99 (Priest Rapids) declarations were filed the government had completed taking by condemnation or purchase all lands in the Priest Rapids district. It seems to me Richland was entitled to meet the government on battle lines the government had drawn—land alone in 128-98 and water for 128-98 lands in 128-100.[2] Richland waived a jury in 128-98 and asked for one in 128-100. It is to be recalled that the trial in 128-98 began first while Priest Rapids was on appeal. The trial had run for less than a day when all further proceedings were suspended as to Richland pending determination of the appeal in Priest Rapids.[3] Months

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[2]It is true that the amended petition in 128-100 which describes water rights of Richland, canals, ditches, laterals, easements, appurtenances and some small tracts of land apparently part of the irrigation system (but not the foreclosed lands described in 128-98) does say that the government claims that by reason of its ownership of all the real property lying within the Richland Irrigation District it was the equitable owner of everything described in 128-100. Maybe full beneficial title to the water on 128-98 lands was taken with the land when the declaration of taking was filed, rather than when final judgment was entered. (128-1 to 128-100 were all a part of the overall condemnation begun originally as "128" without subdivision numbers, which came later.) But it still seems Richland justifiably relied on the value of the water for the lands of 128-98 being in 128-100. For what was $48,300 deposited in 128-100? Bare legal titles?

[3]In the one day abortive session the plaintiff offered only one valuation witness, who gave testimony as to the land with and without a water right. The defendant presented two witnesses. The testimony of both of defendant's witnesses seems to be as to the value of the land, non-irrigated but irrigable. One positively excluded the value of water from his figure and, as I read the testimony of the other, I believe he did likewise.

During this first session the defendant district was at all times stoutly insisting that the water should be valued in 128-100. The trial court was inclining to a view that the appurtenant water should be valued in 128-98, but also freely received testimony of the value of the land without water.

later, after the Priest Rapids decision came down from this court, a pretrial conference (in the middle of 128-98) was held. At the conclusion thereof, the parties were informed clearly that the water on the foreclosed lands would be valued in 128-98 and that the trial court would direct a verdict for one dollar in 128-100, the jury case, when it came up for trial. This one dollar verdict would be somewhat less than the amount of $48,300 deposited by the government in 128-100 with its declaration of taking.

It would seem that the trial court was acting wisely in moving the appurtenance—water—over to 128-98 for valuation along with the foreclosed land to which it belonged, provided Richland lost no substantial rights. But then and there the effect was to deprive Richland of a trial of the value of its water before a jury. Richland did not complain then and has not complained expressly here that it was denied a jury trial in 128-98 for its water. But it has lustily complained all of the way that water was valued in 128-98 when it should have been valued in 128-100. I think I know why they complain—no jury in 128-98. It is easy to say, "If Richland was dissatisfied with not having a jury when the trial resumed in 128-98, it should have asked to be relieved of its waiver of jury." Maybe lawyers can be found who, after the start of a trial without a jury, would rise and tell a trial court, because of an unanticipated turn, they now wanted a jury trial. But I wonder, if we asked those who would do so to form a line, how many would stand in the line. Wouldn't there be a little reluctance to test human frailty, judicial though it may be? When the shift came, when for the first time the issues were clearly delineated (midway in the trial), I say that Richland was entitled to a mistrial on the court's own motion.

Two weeks ago in Bloch v. United States, No. 14,266, this very court picked out an instruction on

wilfulness, with which the defendant seems to have been satisfied, and used the instruction as ground for reversal. Is it a less fundamental matter when a defendant midway in trial loses the jury to which he was entitled under the original framing of the issues? Is it an answer to say to the defendant, "Yes, you complained that the issues were not being tried where you thought they were going to be tried, but you haven't had the nerve to tell the trial judge after he 'shifted the field' that you no longer wanted him; therefore, no harm has been done"?

I would reverse the judgment in 128-98.

(Endorsed:) Opinion and Dissenting Opinion. Filed Apr. 27, 1955. Paul P. O'Brien, Clerk.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT,
a public corporation,
Appellee.

PRIEST RAPIDS IRRIGATION DISTRICT,
a public corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 11,704
Jun. 21, 1949

Appeal from the District Court of the United States for the Eastern District of Washington Southern Division

Before: DENMAN, Chief Judge and HEALY and BONE, Circuit Judges

BONE, Circuit Judge

The United States, hereafter called the Government, sued to condemn all of the property of the Priest Rapids Irrigation District, a quasi-public corporation of the State of Washington, hereafter called the District. The lands sought to be taken were for a large project in aid of World War II. The Government paid into court the sum of $170,500[1] on its declaration of taking the District's properties, as its estimate of their value.

[1]As hereafter appears, the Government contends that payment of this sum entitled it to possession and ownership of so-called "properties of the district." This sum represented the amount of the outstanding indebtedness of the District, and on order of the court this debt was fully discharged by the money so paid by the Government.

HISTORY OF THE CASE

On or about February 23, 1943 an "overall" condemnation proceeding was commenced below by the Government (Case No. 128) to acquire title to and possession of an area of about 206,000 acres of land for the purposes of the above mentioned Government war project. Included in this enormous area was all of the land lying within the District.[2] In reality Case No. 128 was a single suit, even though separate trials were given the several amended petitions. The Government appears to have controlled, in some measure, the division of the suit for these separate trials by filing amended petitions more particularly describing various, comparatively small, groups of tracts. (See footnote 4.)

On May 12, 1944 the Government filed an amended petition in this main case (128), this proceeding being designated below as case or file 128-99. The instant appeal is from the judgment in this particular proceeding which specifically sought condemnation of all of the operating properties and facilities owned or claimed by the district.[3] It appears that at this time the Government had acquired, by purchase and/or condemnation, and was the sole owner of, *all* of the land lying within the boundaries of the District.[4] This

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[2]At the time of initiating the condemnation proceedings, the District embraced 15,950.39 acres. Of this area, 3552.13 acres were privately owned; the State of Washington owned 2194.83 acres, and the United States 38.16 acres. Most of the land—10,165.27 acres—was in the hands of the District.

[3]At various times from April, 1943 to October, 1943 the Government took possession of the so-called "District property" (the subject of this action) under an order or orders granting immediate possession.

[4]The Government acquired, in separate condemnation cases, some of the privately owned tracts in the District. The rest were purchased by direct negotiation with the owners. (See footnote 6.)

acquisition had been accomplished in the interval between the filing of the original petition, and May 12, 1944. Part of the land acquired by purchase was an area of more than 10,000 acres which had been in the hands of the District. For this large tract the Government paid $49,000 and this purchase price will indicate the small value placed by the District upon much of the land within the District.

The issue below and on this appeal is the compensation, if any, which the Government should be required to pay to the District for the "operating properties and facilities" above mentioned, in addition to the $170,500 already paid, as their estimated value. A jury was empaneled to determine certain factual issues formulated by the court, and based on its verdict the court entered judgment for the District and against the government in the sum of $473,356, with interest. The judgment awarded to the Government the title to all "District property" upon the payment of that sum into the court below and provided that this money was to be held, subject to the orders of the lower court, until the dissolution of the District in liquidation proceedings "to be maintained" in the Superior Court of the State of Washington. (Concerning such dissolution proceedings, see Chapter 8 of Title 48, "Disorganization of Districts." "Remington's Revised Statutes of Washington," Vol. 8, §§ 7526 et seq.)

Both parties appealed from the judgment entered upon the jury's verdict.

The verdict was the result of specific instructions of the court, one of which directed the jury to determine the value of electric *power properties* of the District, *less that portion of their value* which the jury should find *had been required for irrigation purposes of the District.* Responding to this specific directive the jury determined this particular part of such value to be $473,356.00 as of October 1, 1943.

The court also directed the jury to answer a special interrogatory. It called for a jury determination of the value of certain types of District property which were generally designated as "irrigation properties," and to *include* in this category of "value" *that portion* or segment of the value of the above mentioned *power properties* which the jury should determine was required for "irrigation purposes" of the District. The District property to be described in the answer to the special interrogatory was defined by the court to be the pumping plant, the power transmission line from Coyote Junction to the pumping plant, the main and lateral irrigation canals, and that part or percentage of the power plant and the transmission line from the plant to Coyote Junction devoted and applied to irrigation purposes at the time of taking, or that would have been so devoted and applied in all probability within the reasonably near future. By way of clarification the court added the admonition that the jury was to divide and allocate the cash, market value of defendant's properties in accordance with its irrigation and non-irrigation uses and purposes. The non-irrigation value which the jury was to find was to be included *in its general verdict,* and the irrigation value was to be included in the statement of value set out in the jury's answer to the special interrogatory. The sum of these two amounts should equal a fair, cash, market value of all of the properties of the District involved in this action. Pursuant to this directive the jury made such an "allocation" and by its answer determined that the value of this kind of "irrigation property" was $365,845 as of April 1, 1943.

In its judgment the court recited generally that the bonded indebtedness of the District was a lien upon these so-called *irrigation properties* of the District,[5]

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[5]See reference herein to Washington Statutes relating to Irrigation Districts.

and that the $170,500 deposited by the Government as estimated just compensation for the taking of *all* of the property of the District shall be a charge *against the irrigation properties only* and that no other sum shall be paid by the Government as just compensation for the taking of (these) *irrigation properties.*

With this view of the law as respects compensation and based upon this division of values, the court entered judgment for $473,356, which sum was declared to represent the value of District power properties *less* the portion of the value found by the jury to be required for "irrigation purposes." The judgment rejected the claim of the District that it was entitled to compensation for these so-called *irrigation properties* upon which the jury had placed a value of $365,845. Judgment went accordingly.

The reason for, and the basis of, the judgment in this case is indicated in the record which shows that at the trial (conducted under two judges, Judge Driver succeeding Judge Schwellenbach) the court made its own arbitrary division of so-called "District properties" into two categories. The first one included the electrical power properties of the District which were (under Washington law) created and/or acquired to make possible (through the use of electric energy) the placing of irrigation water on District lands.

The second category included assets referred to by the court as "irrigation properties," and in this category the court also *included that part* (of the value) of the power properties (referred to in the first category) which were "used" to service the irrigation needs of the District. This particular "part," (or value thereof) was to be *excluded* from the first category. As respects these so-called "irrigation properties" to be included in the second category, the "special verdict" of the jury found them to have a value

of $365,845 and, as indicated above, the District claim for compensation for properties in this second category was rejected.

The application of this "division of values" formula was the result of a decision reached by Judge Driver in which he stated that he felt an obligation to apply a (this) formula previously adopted by his predecessor, Judge Schwellenbach, who had expressed the view that the landowners within the District were, in a sense, in a dual position—they owned irrigated land with water rights appurtenant thereto for which they were entitled to compensation—they were also, in a sense, in the position of stockholders in the District, that is, they were entitled to compensation in (for) their proportionate share of the (corporate) "assets of the District."

The "assets," (which Judge Driver regarded as being required for "irrigation purposes",) had been viewed by Judge Schwellenbach "as the irrigation assets or assets adapted to and used for the supplying of water for the lands." These were considered by Judge Schwellenbach as having "entered into and became a part of the value of the land and [for which] the Government compensated the owner for that [sic] when they paid him the fair market value of the land as determined by the jury."[6]

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[6]Judge Schwellenbach had already carried on or concluded separate jury trials involving many of these original landowners —all of them except those who had conveyed their lands to the Government by deeds. (See footnote 4.) Judge Schwellenbach was here referring to jury verdicts in these cases. During the trial the District made an offer of proof showing the total amount paid by the Government for all lands of every kind and character within the District. This amount was $630,960.80. For all of the lands within the District which were privately owned (3552.13 acres) the Government paid to the owners thereof, or deposited for their benefit, the sum of $574,164.30 which sum represented an average compensation for such lands slightly in excess of $160 per acre. The offer was denied by the court on

Judge Driver assumed that the Schwellenbach formula meant that as to the assets of the District *"which were not used exclusively for irrigation,* that they did not enter into the value of the land as determined by the jury, that the owner was entitled to his pro-rata share as to the *value of those properties not used for irrigation."* (Emphasis supplied.) He further clarified his view of the rule to be applied as follows:

> "I think we should regard this situation as it existed at the time of the taking by the Government, and at that time the power plant was an integral part of the irrigation system, and was devoted to irrigation purposes *to the extent of the power used for pumping water for irrigation,* and on that basis the objection [of the Government] will be sustained."

And again:

> "I think if the formula is to be applied it would have to be applied to the situation as it existed in 1943, and the power plant then was an integral part of the irrigation system, and to a certain extent, *its use was allocated and applied for pumping water for irrigation."* (Emphasis supplied.)

These and other comments of the judges set out or referred to below make plain the reason for the kind of judgment entered in this case.

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objection by the Government, one objection being that the value of the (District) facilities could not be established by proof of the sum paid by the Government for all lands in the District, and the value of these facilities for the use for which they were intended could only be determined by the additional value given to the lands through their utilization for the purpose for which they were intended; that the difference between the alleged cost price of these facilities and the sum paid for these (District) lands in no way reflects the value of the facilities.

Certain facts established in the evidence throw interesting sidelights on the case. Despite the large acreage included within the corporate boundaries of the District, only 1200 acres of land were actually supplied with water, i.e., "under irrigation." About 12,000 acres had never been "irrigated." As a result of this situation, the electrical generating plant owned and operated by the District was not required to devote all of its capacity and output to service the actual irrigation needs of the District. For this reason the District had arranged to sell its surplus power output to a private power company, and the record shows that over a period of eleven years preceding the trial the District had sold to this company 55% of the electric energy it produced. The record also shows that *all* of the revenue derived from such power sales was employed to support and carry on (under Washington law) each anl all of the corporate purposes of the District including maintenance and operation, and servicing the outstanding bonded indebtedness. This application of power revenues would, of course, reduce assessments on private lands to meet debt obligations of the District. It is not to be doubted that in this sort of District operation the power plant was being fully used to promote and support all of the declared purposes of such a district.[7]

Before reaching the contentions of the parties on this appeal we refer to the fact that Judges Schwellenbach and Driver were confronted with the necessity of considering and dealing with what seemed to them to present an anomalous and unprecedented situation. Both referred to the fact that counsel had not cited authorities which dealt with a comparable problem. Both were frankly impressed with the strength

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[7]This utilization of power plant revenues finds sanction in the State law under which these districts operate and enjoy corporate existence. See Chapter 5 of Title 48, "Irrigation Districts," Remington's Revised Statutes of Wash. Vol. 8.

of the Government's position, Judge Driver stating that he regarded it as "strong * * * almost unanswerable," and Judge Schwellenbach stated that there were "good grounds," for the Government's view. However, both Judges were persuaded that basic notions or equity and justice called for the application of the formula here applied. Both were convinced that it would have produced a chaotic situation and one resulting in interminable delay had the question of each landowner's claimed pro-rata "interest" in so-called "District assets" been submitted to individual juries trying the various condemnation suits to acquire individual privately-owned tracts of land with the consequent necessity of presenting, over and over, the question of value of these "assets." The probability of a different figure of value thereon in each of these cases presented an insoluble problem, as indicated in illuminating comment and rulings by the district judges.

In meeting this situation they employed the so-called Schwellenbach formula, and their reasons for so doing present a very persuasive argument. Its "division of values," appealed to them as offering a logical and just solution of the dilemma confronting them by reason of the very peculiar posture of this case.

No appeals were taken from the awards in the cases (see footnotes 4 and 6) where private lands within the District were condemned by the Government, and the lower court was without the benefit of an expression from this court as to the "rights" of these private landowners in so-called "District assets" which could or might have been asserted in those cases.[8]

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[8]The record shows that when the individual condemnation cases were tried, the Government successfully resisted efforts of owners of these condemned private tracts to have the juries in these several cases fix the pro-rata share of so-called District assets each owner might be entitled to receive in the event of

a dissolution of the District. In these cases, the Government asserted that it intended to acquire all of the property within the District, as a result of which it would then become the owner of the facilities and instrumentalities of the District. This posture of the case led Judge Schwellenbach on April 26, 1944, and in the instant case, to advise Government counsel that since there had been an abandonment of appeal efforts in these (private) cases, he would re-open them (on motions for a new trial) for the admission of the proof which he had rejected on demand of the Government, unless a declaration of taking was filed before the next trial (in June, 1944). The Government thereupon, and on May 12, 1944 did file a declaration of taking of the so-called "District assets." Referring to the previous condemnation proceedings against privately owned tracts, Government counsel insisted in the case at bar that it was the contention of the Government that the water rights in the District are appurtenant to the lands being acquired by the Government; that the instrumentalities of the District are impressed with a trust in favor of the lands, and that the value of the water rights and instrumentalities is fully reflected in the values placed upon the private lands in the various condemnation cases by both Government and defendant's witnesses.

THE GOVERNMENT'S APPEAL

It is the position of the Government that when it became the sole owner of *all* of the land within the District (District debts being extinguished as above indicated), it became the owner of all of the beneficial title to the District's property without payment of any further sum than the $170,500. It places reliance on a decision of the Supreme Court of Washington, In re Horse Heaven Irrigation District, 11 Wash. 2nd 218; 118 Pac. 2nd 972. That case held that distribution (of district assets) should be confined to those who owned land in the district *at the time it was dissolved.* It also held that the district owns property and operates wholly in a proprietary capacity—for the benefit of the landowners—they are the beneficiaries of a trust. Upon this authority the Government argues that having acquired *all* of the land in the District, it is the beneficiary of the trust.[9]

The Government's argument in support of the foregoing contention is that *all* District-owned facilities of every kind and character were, under Washington law, ***wholly*** devoted to irrigation purposes and were

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[9]Entirely aside from the question of the validity of the compensation award, we think that the court did not err by directing in its judgment that the amount of the award should be paid into the lower court there to remain subject to the orders of the court until such time as the court should order payment of the same to the Superior Court of the State of Washington for Benton County, for the use and benefit of the District in liquidation proceedings "to be maintained" in said Superior Court. (See reference in this opinion to provision in Washington laws relating to "Disorganization" proceedings.) By directing that payment of the award to be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court under applicable state law in the so-called "Disorganization" proceedings pending in the State court. (See Horse Heaven case, supra.) The rights of all parties are preserved under this procedure.

inseparable from the lands they served, and in thinking that the District had power facilities "not applicable to these irrigation purposes," Judge Schwellenbach made the "fundamental error" since there is no basis for such a concept. This idea rested on the fact that the District sold power unneeded for pumping irrigation water but that did not *divorce* any part of the generating facilities from the irrigation project since they were designed and intended to supply the irrigation needs of those owning lands in the District. Power sales could not be permanent in light of possible needs of the District. In short, the District was lawfully required to devote *all* of its power facilities to "irigation purposes"—they were in fact "irrigation facilities"—and having paid (under the Schwellenbach formula) for all District property "devoted to irrigation purposes," the Government thereby acquired title to the power properties.

Among other contentions urged is that in paying the former landowners the fair market value of their lands they have received in condemnation as much as they would have got from a voluntary sale; that the properties of the district were held beneficially by the District for landowners therein; that if any one lacking the power of eminent domain had purchased all of the individually owned land in the District, none would doubt that the purchaser had ipso facto acquired *all* of the assets of the District and the former owners had lost *all* of their interest in the same; that the Government, possessing power of acquisition of title by condemnation, has acquired all of the lands in the District and paid the former owners the full market value thereof, and requiring it to pay an additional amount for their benefit is erroneous under the doctrine of the Horse Heaven case, supra; that case held that distribution of corporate assets of the District should be confined to those who owned lands in the District at the time it was dissolved, and being the present owner of all lands in the District, the Gov-

ernment is entitled to the legal title to the property of the District without paying any additional amount; that the Government's liability to the landowners would have been the same if the District-held properties had been taken before rather than after the taking of the privately owned lands. In this connection it emphasizes the fact that the filing of this declaration of taking of District assets and the accompanying deposit of $170,500 did not reopen the earlier condemnation cases against private landowners none of which had been appealed.

Based on these and allied reasons the Government objects to the application of the Schwellenbach formula with its resulting judgment. Our summary of its contentions is amplified by an argument of its counsel at trial. He said:

> "The value of those district facilities as irrigation facilities necessarily are reflected in the value of the land. Now, that doesn't mean the value that counsel might want to ascribe to its facilities separated from their duty to the land, because after all, irrigation facilities and properties have no value except as they are applied to the irrigation of the land * * * you might get the same identical benefits from the investment of fifty thousand or five million dollars. The true value of irrigation facilities is reflected only in the benefits that accrue to the land served thereby, and the Government's contention and position is predicated upon the fact that the irrigation facilities are as valuable as the benefits that they confer on the lands which they serve, and if those lands are purchased and paid for as irrigated lands, with all of those benefits accruing, then the full value of the irrigation facilities for the purpose for which they were designed have been compensated. I think that makes the Government's position clear on that particular thing. * * * It

[this statement] does apply to the actual value of the facilities to the lands which they serve, as irrigation facilities." (See also contentions of Government, Footnote 8.)

The Government also relies on the Declaration of Taking Act (40 U.S.C.A. § 258(a)) which provides, inter alia, that "if the compensation finally awarded in respect to said lands * * * shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the *deficiency.*" (Emphasis supplied.) Under this provision of law, the court below was, in any event, authorized to enter judgment only for $473,356 *less* the $170,500 paid to the District on the taking of its properties, or $302,856. Its prayer is for a reversal of the judgment and remand with directions to the court to enter judgment for a nominal sum.

THE DISTRICT'S APPEAL

The District rejects in toto all of the contentions of the Government and it assails the validity of the so-called Schwellenbach formula. It asserts that it should receive not only $473,356 as the value of its power properties, but also the further sum of $365,-845 representing the value of its "irrigation properties." Against this total of $839,401 it would have us direct a credit to the Government for the $170,500 paid on the taking of District property and order the lower court to enter judgment in its favor for $668,-701, with interest from the date of taking of the various segments of District property.

THE SCHWELLENBACH "FORMULA"

In considering this case it is obvious that we cannot reach back to the cases wherein the private lands in the District were condemned by the Government, since we have no jurisdiction over those cases on this

appeal. However, they were part and parcel of the main condemnation case (128) of which the case at bar is a part, and they were repeatedly injected into this case by frequent contentions of counsel for both parties regarding just what elements of claimed property values had (under the instructions to juries in those cases) been recognized by the court as attaching to and inhering in ownership of these lands, and submitted to the juries as an element to be evaluated and allowed as a part of the fair market value of such lands. (See rulings of the court on this point cited infra.)

As respects this factual aspect of these preceding jury trials we accept the appraisal of Judge Schwellenbach. It sustains his ruling that in the case at bar the District was asserting a claim for compensation for an element of added value attached to lands in the District by reason of the fact that they were "irrigated lands"—an element which he held had been previously considered by condemnation juries and for which compensation had been awarded to landowners in their verdicts. Judge Schwellenbach had presided over these preceding trials and had instructed the juries, and it is clear that his intimate knowledge of the posture of those cases caused him to adopt his so-called formula in this case.

Judge Schwellenbach faced the fact that in the instant case the claimant (the District) appeared in the status of a statutory "trustee" for these former District landowners, and as such trustee, was asserting its right under law to recover for beneficiaries of the trust a second compensation for property considered in the previous trials, i.e., the value of District facilities *as irrigation facilities* which was, in turn, reflected in the value of the land. The fact that this particular claim for compensation for these "irrigation facilities" was asserted by a trustee in its representative capacity rather than by the ultimate bene-

ficiaries of the trust, did not disguise the fundamental fact that it was in reality a demand for compensation for an element of property value for which just compensation had already been paid. We think that the court looked through form to get at the substance of the claim, and that it did not err in regarding it as an effort to secure double compensation.

Judge Driver was also aware that upon completion of the pending District disorganization proceeding in the State court, the proceeds of such a recovery, if authorized here, could not be retained by the District (it would pass out of existence) but would be delivered over to those entitled under State law to receive them. This situation led the Government to assert that in any event its present ownership of all of the lands in the District made it, in effect, the real beneficiary of the trust. It may be assumed that Judge Schwellenbach so regarded this particular aspect of the case and we think that he reached a rational conclusion. (See footnote 9.)

The matters above noted are pointed up by other rulings of both district judges which we quote or refer to since their comments serve to illustrate the difficulties they encountered in solving an extremely complicated legal problem. Before quoting these rulings we note here that this case was considered by two very capable and experienced jurists who would judicially know that these lands are in an arid region and without water would have possessed little or no value. The application of water gave them such value as they had.

Recognizing the rule that compensation should be the full equivalent of property taken, the lower court refused to ignore the obvious fact that it was the *presence, availability and use* of District irrigation facilities which *alone* imparted to, and created in, the privately owned irrigation lands taken by the Govern-

ment the "added value" which was considered by the juries in the landowners' cases and for which compensation was given. These "facilities," so used and so adding to the value of the lands, were those defined under the Schwellenbach formula as the "irrigation properties" of the District, and identified as such in the judgment.

Considering this so-called "added-value" as "property," we think that the record clearly shows that the Government had been required by the instructions of Judge Schwellenbach to compensate private landowners for this element of "value" in the previous condemnation cases, and that the lower court did not err in refusing to allow further compensation for it in this case. Any other conclusion would impeach the jury verdicts upon which both judges deliberately based their rulings in this case.

As we have indicated above, the procedure which applied the Schwellenbach formula appears to have been born of necessity due entirely to the awkward posture of the case, but it also clearly appears that in applying it the lower court was appraising realities and utilizing a practical remedy which, in its end result, insured payment of just compensation for any property taken in this case. If applying the formula did not result in denying just compensation for property here taken, it is not open to attack on purely technical grounds. We would sacrifice substance to form if we reached any other conclusion.

We conclude that the record does not sustain the attack on the validity of the Schwellenbach formula. The reasons for its use advanced by both district judges in their rulings during the trial provide a rational foundation for this view. Judge Schwellenbach said: (he was here speaking exclusively of the non-irrigation assets, not of the so-called "irrigation assets")

"* * * The fact is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share in the District's assets, the petitioner [Government] objected and I ruled against the landowner. The basis of this ruling was that in the trial for the purpose of determining the compensation to be paid for a separate tract, there was no room to try out also the value of that londowner's proportionate share of the District's assets. He was not the owner of the legal title to the District's assets. He had no right to assert a direct claim to his proportionate share. Furthermore, as a matter of procedure, if I had permitted each landowner to assert his claim in each separate trial, it would have resulted in chaos and interminable delay as a consequence of which this [these] cases never would have been completed. * * * it would have resulted in an absurd situation because the landowner in one case would have a jury fixing one value upon the District's assets and then the jury in the next case might place an entirely different value upon the District's assets. The awkwardness and the confusion which would have resulted was realized by counsel on both sides and dozens of cases have been tried since with the understanding that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.

"On the other hand, the landowners are not entitled to compensation for that portion of the District assets which was valuable only for irrigation purposes. *In each one of the trials and in all of the appraisals,* the value of the separate tracts was based upon the proposition that they were within the irrigation district and had irrigation water available. Verdicts and settlements which have been made in these cases have been substantial. They have been based upon the land

valued as irrigated land. For the owner of the lands now to receive compensation for the District assets which were devoted to irrigation purposes would amount to double compensation. * * *

"It seems to me that what must be done in this case is that the Districts set up in their answers their contention as to the value of *that portion* of the [District] assets in each instance *which is not applicable to irrigation purposes and make claim for that amount after giving credit for the sums the petitioner* [Government] *expended in the payment of District obligations.* * * * as I look at the answer of the defendant Richland Irrigation District, I do not see how *it* can be entitled to any compensation. *It* was exclusively an irrigation district and *its* assets were *exclusively used for irrigation purposes.* Any assets listed *which were not so used* were more than covered by the $97,000 which the petitioner [Government] paid. On the other hand, the Priest Rapids District, according to its answer, owned non-irrigation assets valued substantially in excess of the amount of the bond money paid on its behalf." (In speaking of "Districts" and Richland Irrigation District, Judge Schwellenbach evidently alludes to the fact that more than one irrigation district was included in the overall acquisition by the Government in Case 128. Such a reference also appears in the rulings of Judge Driver.)[10]

In his summation at the close of the case Judge Driver made plain that his judgment would provide compensation to the District for only that portion of its facilities not devoted to irrigation uses, his view being that the Government had already in effect paid the equivalent of the value of the irrigation assets of

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[10]See our holding at the conclusion of this opinion. We supply emphasis on all quoted rulings of the district judges.

the District in its payment to the individual landowners within the District. He amplified this conclusion by a further reference to Government acquisition of private lands in the District, in which he stated that:

> "the land is purchased as irrigated lands with the water right attached, that is, with the water right or the duty of water to which the land was irrigated by reason of being included in the irrigation district."

We are in accord with the conclusion of the lower court that utilization of the Schwellenbach formula was eminently fair under the unprecedented circumstances of this case, and that applying it did not work a confiscation of private property or property rights of the District landowners. In this view of the case it logically follows that at the time of entry of judgment the Government had fully paid for and was the owner of all of the so-called irrigation assets of the District.

It would unnecesarily expand this opinion to quote verbatim the rulings of Judge Driver. It is sufficient to say that he appears to have followed and applied the Schwellenbach formula except as to the application of the $170,500 payment made by the Government. It is clear from the record that Judge Driver was fully persuaded that in the cases involving the private lands previously condemned, the juries had been called upon to determine their fair market value which was a value reflecting their strategic situation and their value for all purposes for which they could be used. Had something in addition been allowed because of the appurtenances in the way of water, ditches, pumping plant and power plant for the furnishing of water, the result would necessarily have been a double recovery. We know, as reasonable men, that without these essention appurtenances the lands would have been substantially valueless.

The record shows that the State of Washington owned 2,194 acres, (acquired by the Government) and that the District itself owned 10,165 acres. These District lands were acquired by purchase at a price put upon them by the District in 1942, prior to the institution of condemnation proceedings, when the District placed these lands in the hands of a real estate concern in an attempt to sell them, that price being approximately $49,000. These were undoubtedly lands of inferior quality, the owners having long ceased to pay assessments against them.

It is certainly clear that as to those landowners, including the District, who sold their lands outright to the Government without condemnation proceedings, there could be no legal ground of their complaining as to the price they obtained. It is only as to those individuals whose lands were condemned that any rational grievance can exist, and as to them their cases are res judicata, and not again to be inquired into collaterally in a state court dissolution proceeding or any other kind of state court proceeding.

We are convinced that the final judgment must be modified if it is to conform to the basic theory on which this case was tried. In this conclusion we have due regard for the interpretation of the Schwellenbach formula as expressed in the various trial rulings of both judges below. (See text of Judge Schwellenbach ruling immediately preceding footnote 10.)

For the reasons above stated the lower court was in error in failing to provide in the judgment that the $170,500 paid by the Government should be applied as a credit against the award of $473,356. Judgment against the Government for $302,856 should have been entered.

The case is remanded with directions to the lower court to modify the judgment in accordance with the foregoing views.

DENMAN, Chief Judge, dissenting:

This decision violates (a) the federal condemnation law, (b) the law of the State of Washington, and, (c) the Fifth Amendment's prohibition against the taking of property without compensation.

The court's opinion, by failing to state succinctly the principal fact and the principal authority relied upon by the government, contains pages of discussion of irrelevant matter concerning formulae of compensation to the former landowners of the district in separate condemnation proceedings, none of whom are parties to this proceeding.

A. *No landowner in the district has title in the district properties serving his land. His interest in the district properties held by the district in a proprietary capacity is no more than that of a stockholder in the properties of a corporation serving him by its dividends. Hence no title in the district properties is acquired by a purchase from a prior landowner of land so served.*

This is apparent from the decision of the Washington Supreme Court In re. Horse Heaven Irrigation District, 11 Wash. (2d) 218, 227, where that court held:

> "An irrigation district is a corporation which . . . *owns and uses its property in a strictly proprietary capacity* for the primary benefit of the owners of land included within the district. With the acquisition as owner of land in an irrigation district, that owner immediately acquires an interest in all property of that district. When the district ceases to be a district, the interest of that *owner is as definite and certain as is the interest of a shareholder in an ordinary corporation.*" (Emphasis supplied.)

Of this quotation, the government states:

"Accordingly, the court held that the distribution should be confined to those *who owned land in the District at the time it was dissolved.*" (Emphasis supplied.)

B. *Like the stockholder, the private landowner, when he sells his land, includes in its value his anticipated value on distribution of the corporation's assets.*

Such a factor in the sale or condemnation of private land served by the district or in the sale of stock does not convey ANY TITLE *in the properties of the corporation serving the private landowner or stockholder.*

This is the fundamental error in the court's opinion. It is elemental that the government got no more in acquiring some of the land by condemnation than it acquired by direct purchase from the landowner. In condemnation the jury properly should consider, in valuing the land of the private owner, the anticipated value of the corporation's properties on dissolution.

The value of this interest in the anticipated distribution is in *all* the corporation properties, both those directly serving the privately owned land and also, here, the plant producing power sold to a non-landowner.

If, in the condemnation proceedings against the private landowners, the jury was not allowed to include in the value of their land the anticipated value at dissolution of either the factor of the irrigation ditches and canals owned by the district or the factor of the power plant, that error could be cured only on appeal here by the individual wronged. It is admitted that none has appealed. Hence if the government acquired the privately held land for less than its real value

no private landowner can now complain. The government now owns all the land in the district, with its *anticipated* value upon distribution at the district's dissolution of *all* the district properties.

It is elemental that, because the government now holds all the privately owned land, that mere ownership does not constitute the statutory dissolution of the corporation.

C. *In federal condemnation proceedings, it is now the law of this circuit that the government acquiring the stock of a corporation at once acquires, pro tanto,* TITLE *to the corporation's assets.*

This necessarily follows from the court's opinion that the Horse Heaven case is controlling. There it is squarely held that the interest of the private landowner in the assets of corporate district is identical with that of the stockholder in his corporation's assets.

That this is contrary to universally recognized corporate law is stated in Rhode Island Trust Co. v. Doughton, 270 U.S. 69, at page 81:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, *after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporation property.*" (Emphasis supplied.)

D. *The court's decision violates the Fifth Amendment. It is now the federal condemnation law of this*

circuit that the condemning court need not pay the corporate owner of condemned properties the judgment for this amount, but that it may withhold it until the corporation is dissolved.

This court holds that the district corporation is entitled to an award of some $473,356 for its properties condemned to the government. It holds that the district may never be paid these moneys, but that they shall be paid into court to be held in the district court for distribution *after* the conclusion of a *state court proceeding* for the dissolution of the corporation holding such a judgment. Then, if the government still owns all the land, it will be repaid its deposit. It will never be paid to the successful litigant, though it well may need funds for the expenses of dissolution, if dissolved.

Nowhere does the condemnation legislation warrant such a withholding of the judgment awarded for taking the title of one's properties. The government does not become merged into the corporation by reason of the ownership of all the privately held land, any more than it does when it acquires all the stock of a corporation.

In U.S. v. Strang, 254 U.S. 491, the court affirmed a sustaining of a demurrer to an indictment charging defendant with violating Section 41 Criminal Code which made it a felony for an officer of a corporation or member of a firm to be employed as agent of the United States for the transaction of business with such firm. Defendant was an employee of the Fleet Corporation, all the stock of which was owned by the United States. He was also a member of a partnership, a ship outfitting company. As agent for the Fleet Corporation he signed three orders for the outfitting company to repair and alter a ship. The court said, at page 493:

> "Notwithstanding all its [Fleet Corporation's] stock was owned by the United States, it must be regarded as a separate entity . . . Generally agents of a corporation are not agents of the stockholders, and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation."

From the above, it is apparent that this court is enabling the government to deprive the district of its properties without just compensation, in violation of the Fifth Amendment to the Constitution.

The judgment should be reversed.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jun. 21, 1949. Paul P. O'Brien, Clerk.

APPENDIX C

The Declaration of Taking Act, Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C. 258a:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or

such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 607

RICHLAND IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (R. 802–813) are reported in 222 F. 2d 112. The district court's oral decision in case numbered 128–98[1] appears at R. 661–668.

JURISDICTION

The judgment of the court of appeals (R. 814) was entered on April 27, 1955. A timely petition for rehearing and suggestion for hearing *en banc* was denied on August 10, 1955 (R. 815). The time for filing a petition for writ of certiorari

[1] Throughout this brief the designation of the cases in the district court will be used.

was extended, by order of Mr. Justice Douglas, dated October 21, 1955, to January 7, 1956, and the petition was filed on January 4, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the trial court erred in awarding petitioner a total of $114,017.72 for the condemnation of its properties, consisting of lands within the irrigation district acquired through foreclosure actions, water rights allocable to those lands and irrigation works such as canals, ditches and laterals.

STATEMENT

Needing more than 200,000 acres for the Hanford Engineering Project in the State of Washington, the United States, in February 1943, filed a single condemnation petition including all of the area within a perimeter description. On the same day, the district court ordered the immediate surrender of possession and in October of that year the United States took possession of petitioner's irrigation system (R. 3–8, 12–16, 347).

The entire proceeding was thereafter divided into smaller cases. Petitioner District embraced about 10,400 acres, of which it owned 4,400 because of foreclosures. Compensation was awarded in other cases to the owners of land within the District on the basis that their lands were irrigated with an assured and adequate water supply

(R. 395). In May 1944, the two cases here involved were filed, the petition in each instance being accompanied by a declaration of taking. Number 128–98 referred in terms to parcels of land aggregating 5,000 acres, represented by the 4,400 acres acquired by foreclosure plus 600 acres which were nonirrigable because they were used for the canal right of way and similar purposes (R. 298–339). Case number 128–100, filed three days later, took all titles and interests of petitioner which had not been taken either in the cases against individual owners within the district or in number 128–98 (R. 61–82).

A jury was waived in 128–98 when trial commenced in January 1947. After some evidence had been introduced the case was continued until after the decision in *United States* v. *Priest Rapids Irr. Dist.*, 175 F. 2d 524 (C. A. 9), a case in which the court of appeals sustained the so-called "Schwellenbach formula." This "formula" expressed the rule that, when the individual property owners had recovered the value of their property as benefited by the irrigation district, i. e., as irrigated land, a subsequent claim on behalf of the District—of which the landowners are the beneficial owners—to recover the value of the District facilities used for irrigation, such as canals, constitutes a claim for double compensation and must be rejected.[2]

[2] Judge Schwellenbach had made a distinction, irrelevant to the present case, between irrigation assets of the District

Additional evidence was presented when the trial of 128–98 was resumed, the opinions as to value of the land with appurtenant water rights ranging from $27,380 to $226,500 (R. 364, 443, 460, 569, 644). Petitioner also introduced evidence that the appropriations of water could be diverted to other lands and produced opinions that the value of the water rights apart from the condemned lands was some $200,000 (R. 553–554, 616). Petitioner's offer of evidence of value of its "entire distribution system" on a reproduction basis of some $455,000 or $546,000 was refused (R. 525, 554). The court valued the lands at a total of $114.017.72, assigning varying values for irrigable lands, irrigated pasture lands and nonirrigable lands, and concluding that the land embraced in rights of way had no value (R. 700, 702).[3] The court found that the highest and best

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and electric power properties. The Government's appeal in the *Priest Rapids* case challenged the judgment ordering the United States to pay some $473,000 for those power properties. The court of appeals affirmed the judgment after allowing a credit of $170,000 already paid. Chief Judge Denman's dissent was based primarily, if not completely, on the understanding that, while the United States would pay this amount into court, it would later receive it back if it still owned all of the land within the District. This was not, however, the ultimate result. See *United States* v. *Moulton & Powell*, 188 F. 2d 865 (C. A. 9).

[3] When first announced the award was understood, at least by government counsel, to be in a total amount of $51,912.94. However, upon hearing of motion for new trial, the court explained that in making its award it had taken into account $62,104.78 which had been deposited in 128–100 (R. 690–694). This deposit, together with $36,020 deposited in

use of the undiverted water rights was their use for irrigation of the condemned lands and that, without appurtenant water rights, the lands taken were worth $6,649.60 (R. 699, 700).

Case number 128–100 came on for trial before a jury shortly after the trial of the earlier case and resulted in a directed verdict for $1.00 (R. 260). Upon appeal from both judgments, the cases were affirmed. While questioning the "Schwellenbach formula," Judge Chambers dissented solely on the ground that petitioner should have been accorded a jury trial as to the value of the water rights even though petitioner had made no such claim in either court (R. 812–813).

ARGUMENT

1. The various owners of land within the District (including the District itself, in relation to the foreclosed lands) were compensated for the taking of irrigated lands. These awards necessarily included the value of the dams, canals, ditches, etc., required to furnish such water supply. An additional award computed with reference to the cost of reproduction of those canals, ditches, etc., would plainly constitute double payment for them. Similarly, a reproduction value of streets, sewers, lighting facilities, etc., cannot be added to the market value of land served by such

128–98 and with petitioner's bond redemption fund, was sufficient to pay off its bonded debt. Thus the total awarded petitioner was $114,017.72 (Pet. 19).

improvements. E. g., *United States* v. *City of New York,* 165 F. 2d 526 (C. A. 2). Such double compensation cannot be justified by reference to the *in rem* character of condemnation proceedings (cf. Pet. 20–22). The taking in 128–100 of technical title to the irrigation facilities no more required additional compensation than does the taking of technical title to a street whose substantial value has already been reflected in the award of the market value of properties to which it gives access. See *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786, 790 (C. A. 4).

2. The claim that the water rights as to foreclosed lands were valued in the wrong case (Pet. 22–24) is not shown to have had any substantial effect on the amount of the award. Petitioner does not adopt Judge Chambers' novel suggestion that the real complaint is its failure to receive a jury trial, which it never demanded. Petitioner does not, and cannot, challenge the finding of fact of both courts below that the best use of the water rights was in connection with the foreclosed lands (R. 807–808). For this use the court has found the value of the water rights to be about $107,000 (R. 806). The alleged error is thus harmless.

Moreover, the water rights appurtenant to the foreclosed lands owned by the District were taken in case 128–98 as one of the appurtenances to the fee title to the lands, just as they were taken under the identical language applied to the cases

of private landowners (R. 804, 805–806). Petitioner's mere assertion that the pleadings should be construed otherwise (Pet. 24) has no tendency to indicate error in the interpretation adopted by both courts below.[4]

The complete answer to petitioner's third point (Pet. 25–26) is that there was ample evidence to support a valuation of the water rights, since valuations of the foreclosed lands with appurtenant water rights ranged from $27,380 to $226,500 (R. 364, 443, 460, 569, 644). And see discussion of the district court (R. 662–667) and of the court of appeals (R. 806–809).

CONCLUSION

The decision of the court below is clearly correct and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1956.

[4] The principle of cases such as *Anderson* v. *United States*, 179 F. 2d 281 (C. A. 5), certiorari denied, 339 U. S. 965, that property is to be valued as of the date of taking possession, rather than the date of subsequent passage of title by filing of a declaration of taking, was applied throughout the trial pursuant to agreement of counsel (R. 347, 696, 700). The decisions below are in accord with this principle.

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